Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1940

U. S. CABLEVISION CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL APPENDIX

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June 13, 1980

240 NLRB No. 23

D-4624
Providence, R. I.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

U. S. Cablevision Corp. and Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC	Case 2—CA—15793

DECISION AND ORDER

Upon a charge filed on August 8, 1978, by Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC, herein called the Union, and duly served on U.S. Cablevision Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 2, issued a complaint and notice of hearing on August 30, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 30, 1978, following a Board election in Case 2—RC—17833 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropri-

ate,[1] and that, commencing on or about July 28, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 13, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 2, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 12, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent admits its refusal to bargain, but denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, it contends, contrary to the allegation of the complaint, that the Union has

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[1] Official notice is taken of the record in the representation proceeding, Case 2—RC--17833, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

not been at times material the unit employees' bargaining representative and that its certification to that effect is invalid. Underlying its position is the further contention that its objections to the February 9, 1978, election were, especially without a hearing, improperly overruled and that due to certain alleged "special circumstances," relitigation of matters raised and litigated in the underlying representation hearing cannot properly be precluded in this proceeding. The General Counsel contends that the Respondent's contentions are without merit in that they seek to raise issues which were presented to and decided by the Regional Director and by the Board in the underlying representation case.

A review of the record herein, including the record in Case 2—RC—17833, shows the following: On December 1, 1977, a petition was filed by the Union. On December 28, 1977, the Regional Director approved a Stipulation for Certification Upon Consent Election, executed by the Union and Respondent on that same date, in which the appropriate unit for collective bargaining was found to consist of all full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office, clerical and professional employees, guards, and supervisors as defined in the Act.

On February 9, 1978, an election by secret ballot was conducted under the supervision of the Regional Director, pursuant to the Stipulation for Certification Upon Consent Election. A majority of the unit employees selected the Union as their representative for the purposes of collective bargaining. Respondent filed timely objections to the conduct of the election which were overruled in their entirety by the Regional Director in her Report on Objections and Recommendations issued on March 24, 1978, in which she

recommended instead that the Union be certified as the exclusive collective-bargaining representative of the employees in the unit described above. On April 17, 1978, Respondent filed exceptions to the Regional Director's report and a supporting brief. However, in its decision dated June 30, 1978, the Board found Respondent's exceptions to be without merit and adopted the Regional Director's findings and recommendations and certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit. In its decision the Board held specifically that the issues raised by Respondent in its exceptions to the Regional Director's report raised nothing requiring either reversal of the Regional Director or the holding of a hearing.

Commencing on or about July 7, 1978, and August 16, 1978, the Union by its president, Frank Maher, telephoned Respondent's general manager, Howard Erichsen, and requested that Respondent meet and bargain collectively with it as the exclusive collective-bargaining representative of said employees with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment. On July 20, 1978, the Respondent by letter advised the Union that it was taking its request to meet and bargain under advisement and by letter dated July 28, 1978, refused and, as it concedes, has continued at all times to refuse to recognize the Union and to bargain with it as the bargaining representative of the unit employees.[2]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which

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[2] The letters were signed by George P. Sisson, president of Colony Communications, Inc. In its answer to the complaint Respondent admitted that it is a wholly owned subsidiary of Colony and there is no contention that Sisson in his letters of July 20 and 28 was not properly acting on behalf of the Respondent.

were or could have been litigated in a prior representation proceeding.[3]

The issues which the Respondent seeks to raise in defense of its refusal to recognize and bargain with the Union were, as the General Counsel alleges and as it concedes, raised and litigated in the underlying representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence. It does contend that special circumstances exist which require the Board to reexamine the decision made in the representation proceeding. In this regard it relies solely on the fact that its objections to the election involved in part a form used by Region 2 in an election proceeding. However, that matter could have been and in substance was raised by Respondent and in substance litigated in the representation proceeding and in any case does not constitute a "special circumstance" warranting relitigation of, or a hearing on, the decision reached in the representation case. Therefore, we find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Rhode Island corporation engaged in the operation of providing community antenna television (CATV) services to customers in the Beacon-Monroe area and has maintained its principal office and place of business in Providence, Rhode Island, and field offices located in Beacon and Monroe, New York. During the past year,

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Respondent, in the course and conduct of its operations, derived gross revenue in excess of $100,000 and purchased and received at its various facilities, goods and materials valued in excess of $50,000, directly from States of the United States other than the State in which Respondent's facilities are located.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 320, International Brotherhood of Electrical Workers, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

2. The Certification

On February 9, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 30, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about July 7, 1978, and at all times thereafter, including August 16, 1978, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 28, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 28, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the

several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. U.S. Cablevision Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 320, International Brotherhod of Electrical Workers AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 30, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 28, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, U.S. Cablevision Corp., Beacon and Monroe, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at both its Beacon and Monroe, New York, New York, facilities copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., January 23, 1979

HOWARD JENKINS, JR., *Member*

BETTY SOUTHARD MURPHY, *Member*

JOHN C. TRUESDALE, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

U.S. CABLEVISION CORP.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10007, 212-264-0360.